Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States
October Term, 1997

Carl T. C. Gutierrez, official capacity, et al.,
Petitioners.

v.

Guam Society of Obstetricians and Gynecologists, et al.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit,

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred by doubling the fee awarded against the officials of the Government of Guam on the basis of factors already considered in the enhanced loadstar fee.

2. Whether the court below erred by approving the use of a multiplier to double an already enhanced lodestar fee, absent a showing of actual difficulties in finding counsel.

3. Whether the lower court erred by doubling fees because the legislature passed an unconstitutional law and the Governor of Guam did not veto it.

4. Whether the lower court erred by approving fees to the American Civil Liberties Union-Reproductive Freedom Project (hereafter ACLU/RFP) at the rates of the largest New York City law firms rather than at prevailing market rates in the relevant legal community of Guam absent a showing that local counsel was unavailable.

LIST OF PARTIES

The following are the named plaintiffs in this suit (respondents herein) :

Guam Society of Obstetricians and Gynecologists; Reverend Milton H. Cole, Jr.; Laurie Konwith; Edmund A. Griley, M.D.; William S. Freeman, M.D.; and John Dunlop, M.D..

The following people were originally named as defendants in their personal and official capacities:

Joseph F. Ada, Governor of Guam; Elizabeth Barrett-Anderson, Attorney General of Guam; Leticia Espaldon, Director of the Department of Public Health and Social Services; and George B. Palican.

In the court below, on the issue of attorney's fees which is the subject of this peittion, the following were defendants: Carl T.C. Gutierrez, in his official capacity as Governor of Guam; the Director of the Department of Public Health & Social Services for the Territory of Guam; the Administrator of the Guam Memorial Hospital Authority; the Attorney General of the Territory of Guam; and the Members of the Guam Election Commission.

Originally, the suite named as defendants, in their official capacities, the persons who filled the above listed positions. However, none of these people presently hold the offices listed. Therefore, except for the substitution of the name of the current Governor, the official titles are substituted for the names of the individuals.

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B1. *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, 5 F.3d, 536 (9th Cir. 1992) (Order)

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F. *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, slip op. (9th Cir. May 19, 1997)

CITATION OF THE REPORTS OF THE OPINIONS AND ORDERS IN THE CASE BY THE COURTS BELOW

The original case on the merits of the action is *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, 776 F.Supp. 1422 (D. Guam 1990), *aff'd* 962 F. 2d 1366 (9th Cir. 1992), *cert. denied*, 505 U.S. 1011 (1992).

The case on the issue of attorney fees is *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, No. 90-00013 (D. Guam June 25, 1991) [Appendix A]; vacated and remanded 5 F.3d 536 (9th Cir. 1993) (mem.) [Appendix B1]; decision and order after remand No. 90-00013 (D. Guam Dec. 10, 1993) [Appendix C], *aff'd* 100 F.3d 691 (9th Cir. 1997) [Appendix E], *reh. denied* slip op. (9th Cir. May 19, 1997) [Appendix F].

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on November 7, 1996. A timely petition for rehearing was denied on May 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The basis for federal jurisdiction in the court of first instance is 42 U.S.C. §1983; 28 U.S.C. §§ 1291, 2107.

STATUTES

42 U.S.C. §1988 (b)

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [42 U.S.C.A. §1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. §2000bbet seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et sq.], or section 1381 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

On March 8, 1990 the Guam Legislature passed Bill 848, the "most restrictive anti-abortion law enacted under the U.S. flag." *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, No. 90-00013 (D. Guam Dec. 10, 1993) at 7 [Appendix C]. (CR 340 at 7).[1] The bill was passed in spite of a well written opinion letter written by the Attorney General of Guam advising the legislature that the law was clearly unconstitutional. *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, 100 F. 3d 691, 718 (9th Cir. 1996) [Appendix E].[2]

Even before the bill was signed into law by the Governor of Guam, the ACLU/RFP and the law firm of Arriola Cowan and Bordallo (hereinafter AC&B) were developing a litigation strategy and working on the brief. (CR 275, para. 7, exhibit A; CR 258, exhibit C). On or about March 18, 1990, the director of RFP traveled to Guam in order to present Governor Ada with constitutional arguments against signing the anti- abortion bill into law and to assist AC&B in bringing a challenge to

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[1] The author of the bill, Senator Belle Arriola, is the mother of Anita Arriola, then an associate in the law firm representing plaintiffs. J. Arriola, a senior partner in the plaintiffs' law firm, is her father.

[2] The Attorney General, who is appointed by the Governor of Guam, is also a defendant in this case.

the statute in federal court. (CR 275, para 7.) The Governor signed the bill into Law on March 19, 1990.

On March 23, two weeks after passage of the law, the complaint and motion for temporary restraining order were filed. (CR 7.) The parties stipulated to a continuing temporary restraining order until the trial on the merits. (CR 12.) The initial reaction of the judge of the District Court of Guam to the underlying controversy was as follows: "I would have to say that [in] eight years on the bench, this is the easiest issue that I've ever been confronted with." R.T. 3-26-90, CR 18, at 7. *Guam Society of Obstetricians And Gynecologists*, 100 F.3d 691, 704 (9th Cir. 1996) (Kozinski, J. dissenting) [Appendex E].

In conjunction with the motion for summary judgment, Plaintiffs submitted the declaration of Robert F. Rogers, PH.D., professor of political science at the University of Guam to show how unpopular the abortion statute was with Guam voters. Rogers conducted a nonpartisan public opinion survey and came to the conclusion that "Contrary to conventional wisdom, Guam is apparently not overwhelmingly 'pro-life'." CR. 116 Ex. V. Rogers found that 40% percent of the voters on Guam were opposed to the Governor signing the abortion bill. He rated his poll as accurate within 4%.

There was no trial or evidentiary hearing in this case. The Judge's initial sentiments regarding the

simplicity of the case were echoed in his written opinion granting the Plaintiffs' summary judgement; "After the emotionalism and stridency of opposing views are stripped away, the strict legal issue before the Court is not one difficult of resolution: Is *Roe v. Wade* the law in the Territory of Guam?" *Guam Society of Obstetricians and Gynecologists v. Ada*, 776 F.Supp. 1422, 1426 (D. Guam 1990). The district court made clear that it did not have to grapple with difficult legal theories or lines of conflicting case law when arriving at the decision. In fact, the Judge contended that the Governor's argument had "no known precedent in American jurisprudential history". *Id.*

The same judge who found the case so easy to decide and devoid of legal merit proceeded to award plaintiffs' counsel $552,000.00 in legal fees. The fee award included a substantial enhancement of the hourly rate of the members of the firm: A. Arriola's standard rate of $120.00 enhanced to $175.00, Cowan's standard rate of $130.00 to $195.00 and J. Arriola's standard rate of $130.00 enhanced to $195.00. (Cr 258, para 19.). The request was based on the claim that the case was factually and legally difficult. (CR 258, para 21, 22.) It also included a request for multiplier to double the loadstar fee, in part to compensate for the contingent nature of the case.

The Territory of Guam appealed and the Ninth Circuit vacated the award due to the intervening case of

City of Burlington v. Dague, 505 U.S. 559 (1992). *Guam Society of Obstetricians and Gynecologists v. Ada*, 5 F.2d 536 (9th Cir. 1993) (mem) [Appendix B1].

On remand, the District Court reinstated the fee award in full including the multiplier doubling fees. The court gave the following reasons for its decision to reinstate the award in full:

> After due consideration the court declines to lessen the multiplier of two or otherwise alter its original award. While the risk of the contingent fee did factor into the court's first decision, the more important considerations as reflected in the decision, were the extreme undesirability of the case, the likelihood that no other attorney on island would have accepted the case and the rare and exceptional nature of the case particularly in the small island community of Guam."

(CR 340 at 6). The court's finding that the case was extremely undesirable is belied by evidence presented by plaintiffs that 40% of Guam voters were apposed to the statute.

Attorney General Elizabeth Barrett-Anderson appointed by the Governor of Guam was named as a defendant in this case her personal as well as official capacity even though she took the position from the beginning that the law was unconstitutional. Other defendants such as Leticia Espaldon head of the De-

partment of Public health had to retain private counsel because they differed with the Attorney General as to whether the law was constitutional or not. CR 288 at 2. Contrary to the assertion of AC&B, the legal community rallied behind the firm's efforts. The only evidence in the record that anybody had difficulty getting a lawyer was presented on behalf of defendant Leticia V. Espaldon. The declaration of Attorney General Barrett-Anderson stated that it was extremely difficult to find any attorney on Guam willing to represent Espaldon primarily because of the personal beliefs of the attorney's on Guam. Patrick Wolff, who had family ties to Espaldon, was finally persuaded to represent her. *Guam Society*, 100 F.3d at 717 n.37 [Appendix E]. (CR 288 at 2.)

The record is devoid of evidence that any of the plaintiffs in this action experienced actual difficulties obtaining an attorney to represent them. In fact, one of the plaintiffs, Laurie Konwith, was approached by a member of the AC&B firm to become a plaintiff in the case. (CR 295, pg 5.) Konwith did not seek other counsel to represent her in the case. (CR 295, pg 5-6.) Konwith had a written agreement with AC&B concerning costs and an oral agreement regarding fees with the ACLU and AC&B. (CR 295, pg 6-7.) Konwith testified at her deposition that it was her understanding that she had no financial responsibility for the lawsuit. (CR 29,5 p. 7.) Plaintiff Howard Cole did not seek other representation before asking to become a plaintiff in the case. (CR 296,

p.5.) Cole did not have a written fee agreement with AC&B or the ACLU. (Cr 296, 7.) Cole was informed by the ACLU that they take public interest cases and that they did not bill the people they represent. (CR 296, 9.) ACLU/RFP attorney, Simon Heller gave Cole the impression that the case could not be lost. (CR 296, p.10.)

The court further noted that the multiplier was appropriate in this case in part due to the "novel legal aspects it presented as the most restrictive anti-abortion law enacted under the U.S. flag." *Guam Society*, No. 90-00013 (D. Guam Dec. 10, 1993) at 7 [Appendix C]. (CR 340 at 7). Thus, the court "double counted" by enhancing the hourly rate due to the difficulty of the case and again considering it as a factor in applying the multiplier. In addition, the court awarded an additional $7,615.80 which constituted time and costs spent on preparing the second fee application. As the dissent notes, "...I see no justification for charging the defendants for preparing the first (erroneous) fee application and then again for its success". *Guam Society*, 100 F.3d at 706, n.7 (Kozinski, J. dissent) [Appendix E].

ARGUMENT

I. The District Court of Guam improperly doubled the attorney fees of AC&B to compensate for factors that are subsumed in the loadstar by the enhanced hourly rate.

A prevailing party in a civil rights action is entitled to an award for a reasonable attorney's fee pursuant to § 1988. However, this Court has made it clear that fee awards should not result in a "windfall" to counsel and that fee shifting statutes were not "designed as a form of economic relief to improve the financial lot of lawyers." *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *City of Burlington v. Dague*, 505 U.S. 557, 562-63 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S.456, 565 (1986) (*Delaware Valley I*). This Court has established a "strong presumption" that the lodestar represents the reasonable fee. *Dague*, 505 U.S. at 562.

Ignoring this Court's admonitions in *Dague, supra*, the District Judge and the Ninth Circuit bestowed a windfall to counsel by doubling fees for a total of $552,000.00 plus interest. The exorbitant fee awarded to counsel who prevailed in what Circuit Judge Kozinski called this "laughably easy" case "is not reasonable compensation for services prudently rendered; it is a bounty paid to plaintiffs' lawyers for having reeled in a fat and rather sluggish fish." *Guam Society of Obstetricians and Gynecologists, et al. v. Ada, et al.*, 100 F.3d 691, 705 (9th Cir. 1996) (Kozinski, J. dissent) [Appendix E].

The district court arrived at this extravagant sum by using factors such as the "undesirability" of the case and the "novel legal aspects it presented" to enhance the fee of AC&B twice. First, to calculate a reasonable hourly fee and again to justify the award of double fees. *Guam*

Society, No. 90-00013 (D. Guam Dec. 10. 1993) at 6, 7 [Appendix C]. (CR 340 at 6, 7.) Thus, the district court and the majority of the Ninth Circuit, ignored this Court's holding that a lodestar may not be enhanced based upon the difficult nature of a case, because difficulty is necessarily reflected in a reasonable hourly rate times a reasonable number of hours. *Dague*, 505 U.S. at 562-63, citing *Delaware Valley I*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 898 (1984).

Circuit Judge O'Scannlain writing for the dissent from the order rejecting the petition for rehearing and suggestion for rehearing *en banc* in *Guam Society* found that the district judge's award in this case "flies straight in the face" of the Supreme Court's prohibition on double counting fees.

> This case called upon the district court to decide whether Guam's ban on abortions was unconstitutional under *Roe v. Wade*-not exactly rocket science. The district judge considered it "the easiest issue that [he'd] ever been confronted with." Plaintiffs' counsel never-theless claimed that 1,487 billable hours were reasonably necessary to secure this judicial breakthrough. Surprisingly, the district judge agreed, and awarded counsel $175 for each of those 1487 hours. Our divided court affirmed the award, citing statements of Guam attorneys that $175 per hour or more was reasonable

given the "magnitude and controversy" of the case and "the considerable hostility the suit engendered in the community."

In my view, this kind of bounty to litigate the self evident proposition that Guam's ban on abortion violates *Roe* creates perverse incentives for attorney's to run up hours in cases that barely pass the laugh test. As if that were not enough, however, the district court proceeded to double the amount, producing a total award of $443,642.56.

. . .

A district court simply cannot use the difficult and controversial nature of a case both to calculate a reasonable fee and then to enhance it. It's called "double counting," and it's not allowed. *Dague*, 505 U.S. at 562-63. The Supreme Court explained in no uncertain terms that a district judge may not enhance the lodestar based on difficulty because difficulty necessarily is reflected in a reasonable hourly rate or a reasonable number of hours. *Blum*, 465 U.S. at 898-99. A district judge likewise may not enhance the lodestar due to undesirability after he inflates the hourly rate to reflect undesirability.

Guam Society, slip op. (9th Cir. May 19, 1997) at 5756-57 (O'Scannlain, J. dissent) [Appendix F].

The District Judge in the instant case used the difficult and controversial nature of the case to award a substantial enhancement to the normal hourly rates charged by AC&B and then used the same justification to double the fees. The resulting award of $552,000.00 for prevailing on a summary judgment motion is clearly not what Congress intended by a reasonable attorney fee.

The decision of the Ninth Circuit directly conflicts with the Supreme Court decision in *City of Burlington v. Dague*, 505 U.S. 559 (1992) and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) (*Delaware Valley I*). The decision of the lower court directly conflicts with decision in the Fifth Circuit in *Walker v. U.S. Dept. of Housing and Urban Development*, 99 F.3d 761 (5th Cir. 1966). The interpretation of the federal fee shifting statute, 42 U.S.C. §1988, to permit the use of a multiplier to double the loadstar fee is a matter of national application in which there is a need for uniformity.

II. The Court improperly considered the undesirability of the case absent a showing of actual difficulties in finding local counsel

The Ninth Circuit has approved the use of a multiplier where the undesirability of a case created an actual

difficulty for the plaintiff to obtain counsel. In *Fadhl v. City and County of San Francisco*, 859 F. 2.d. 649 (9th Cir. 1986) plaintiff approached 35 attorneys before she found one who would take her case. *Id.* at 651. The plaintiff in *Bouman v. Block*, 940 F.2d 1211, 1236 (9th Cir 1991) *cert. denied* 502 U.S. 1005 (1991) was turned down by 16 attorneys before retaining counsel.

The facts in the instant case differ markedly from *Fadhl* and *Bouman* where plaintiffs showed actual difficulty in retaining counsel. The ACLU/RFP and the firm of AC&B were working on the case even before the law was passed. The attorneys approached one of the plaintiffs to become a plaintiff. As Judge Kozinski notes in his dissent: "This is not a case where plaintiffs tried to get a lawyer but were repeatedly rebuffed". Nonetheless, the majority held a multiplier was justified because proof of actual difficulty in finding counsel is not necessary. *Guam Society*, 100 F.3d at 697-698 [Appendix E].

The Ninth Circuit speculated that it was "unlikely" that plaintiffs could have found other representation because the affidavits of Guam attorneys such as Brad Klemm expressed the opinion that it was "unlikely" that the other qualified attorneys would have taken the case were more credible than the affidavits of Guam attorneys such as Linda Ingles who stated she did not believe "that the ACLU and the Plaintiffs would have experienced difficulty in obtaining local counsel." *Id.* at 698.

The absurdity of the majority's conclusion can best be explained by the following quote:

> A district court's factual findings are reviewed in light of the record, not speculation. Although one could speculate that other attorneys on Guam might have agreed to represent Plaintiffs if offered the opportunity because lawyers have a moral obligation to represent those with unpopular views and might be able to sign a million dollar book deal when the case is over (Dissent at 717 n.38), one could just as easily speculate that only a lawyer with a strong pro-choice philosophy and extensive public interest law experience would have taken this case, of which one could speculate there are few on Guam. However as judges, we are not permitted to engage in speculation. We are confined to the evidence in the record and those inferences that directly follow from that evidence.

Id.

While going to great lengths to say that judges should not engage in speculation, the majority does just that by ignoring the direct testimony of the plaintiffs themselves which established that they had no difficulty finding local counsel in favor of affidavits which "speculate" whether plaintiffs would have difficulty in finding counsel if AC&B had not taken the case. The Ninth

Circuit majority in this case apparently believes that even in cases where the plaintiff hires the first attorney consulted, double fees can be awarded if affidavits speculating on the unavailability of other counsel are submitted to the court.

The holding of the Ninth Circuit should be reversed. The type of speculative and "anecdotal" evidence which was relied upon in this case has been rejected by this Court in *Department of Labor v. Triplett*, 494 U.S. 715 (1990).

> As to the first issue-unavailability of attorneys-the court relied upon three lawyers' assessments. One stated that "fewer qualified attorneys are accepting black lung claims," and that more claimants are proceeding pro se. 180 W.Va., At 541, 378 S.E.2d, at 90. According to a second attorney, "few attorneys are willing to represent black lung claimants." *Ibid.* A third lawyer's evaluation was not contained in the record but consisted of his 1985 testimony to the House subcommittee that "many of his colleagues had'...stated unequivocally that they would not take black lung cases....' " *Id.*, at 542, 378 S.E.2d, at 91 (citations omitted)
>
> . . .
>
> We made clear in Walters that this sort of anecdotal evidence will not overcome the pre-

> sumption of regularity and constitutionality to which a program established by Congress is entitled. 473 U.S., at 324, n.11,105 S.Ct., at 3190, n. 11. The impressions of three lawyers that the current system has produced "few" lawyers, or "Fewer Qualified Attorneys" (whatever that means) and that "many" have left the field, are blatantly insufficient to meet respondents burden of proof, even if entirely unrebutted. *Id.* at 723-724.

Furthermore, the majority decision in *Guam Society* directly conflicts with established decisional law in other circuits. The court of appeals in *King v. Palmer*, 950 F. 2d 771 (D.C. Cir. 1991) relied upon the Supreme Court's opinion in *Triplett*, *supra*, in holding that absent a showing of actual difficulty in finding counsel, affidavits of attorneys unconnected to the case may not be used as a basis for enhancement of the lodestar fee. *King*, 950 F.2d at 779. The plaintiff King, like the plaintiffs in the instant case, did not present evidence of actual difficulties in securing counsel. King retained the first attorney that she contacted. *Id.* at 778. The affidavits of attorneys who were not approached by Ms. King and were never involved in the case were submitted to support the claim that it was unlikely King could have found other counsel. The D.C. Circuit *en banc* rejected the affidavits as meeting the substantial difficulties test:

> Without in any way denigrating the bona fides of these lawyers, we cannot blink the fact that they are obviously self-interested. We think it is indisputable that if such evidence were treated as determinative or even weighty the substantial difficulties test would be met so easily as to become a mere formality. The Supreme Court has itself recently disparaged such anecdotal evidence from attorneys unconnected with the case in the context of attorney's fees disputes. See *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 1433-34, 108 L. Ed. 2d 701 (1990) (holding such evidence to be "blatantly insufficient" to raise a constitutional doubt about federal limits on attorney's fees, "even if entirely unrebutted.")

Id. at 779.

The court also rejected the affidavits from attorneys who "hypothesized" whether the affiant would have taken the case. *Id.* The affidavits in the instant case are of the same speculative and hypothetical nature as those rejected by the D.C. Circuit Court of Appeals in *King*.

In *Huntington Branch, N.A.A.C.P. v. Huntington, N.Y.*, 961 F.2d 1048 (2nd Cir. 1992), the district court awarded a 75% enhancement of the lodestar fee in a civil rights suit. The enhancement was based upon "conclusory affidavits" by lawyers as to whether the plaintiff could

have had difficulty finding counsel. There were no facts in the record which showed that the plaintiff had actual difficulties in finding counsel. The Second Circuit Court of Appeals reversed the 75% enhancement which had been applied to the fees of both private counsel and the NAACP attorney. *Id.* at 1049.

The Fifth Circuit has held that the undesirability of the case is one of the factors subsumed in the lodestar. *Cooper v. Pentecost*, 77 F.3d 829 (5th Cir. 1996). The court further noted that it is questionable whether a district court may use a multiplier as punishment under §1988.

The decision of the Ninth Circuit in this case directly conflicts with existing decisions of the Second and D.C. Circuits which hold that the prevailing party must show actual difficulties in finding counsel before a multiplier can be awarded. *Huntington Branch, N.A.A.C.P. v. Huntington, N.Y.*, 961 F.2d 1048 (2nd Cir. 1992); *King v. Palmer*, 950 F.2d. 771 (D.C. Cir. 1991), *cert. denied*, 505 U.S. 1229, (1992). The applicability of a multiplier in connection with 28 U.S.C. § 1988, a federal fee shifting statutes, is a matter of national application in which there is a need for uniformity.

III. The lower Court application of a multiplier of two resulted in a fee award that is unreasonable and punitive in nature.

Ninth Circuit Judge O'Scannlain states in his dissent "I cannot tell whether our circuit has rejected the Supreme Court's moratorium on double counting for 'controversial cases' or just allowed political correctness to run amok." *Guam Society*, slip op. (9th Cir. May 19, 1997) at 5758 (O'Scannlain, J. dissent) [Appendix F]. The award of fees in this case is so exorbitant that one can only conclude that the district court and the majority of the Ninth Circuit consider it is appropriate to "punish" the taxpayers of Guam because the Guam Legislature passed an unconstitutional statute pertaining to abortion and the Governor of Guam failed to veto it. One cannot help but wonder if the court would have made such an award if the issues in the underlying case were not so volatile and controversial in nature.

Federal fee shifting statutes such as §1988 were not intended to be used to punish taxpayers for the errors of their elected representatives. The intent was to provide reasonable compensation to attorneys for taking civil rights cases. *Delaware Valley I*, 478 U.S. 546, (1986). The loadstar fee includes most, if not all, factors constituting a reasonable attorney fee. *Id.* at 566. The exception to this rule is a tiny one and courts should not permit the exception to eclipse the rule. *Arrade v. Jamestown Housing Authority*, 82 F.3d 1179 (1st Cir 1996); *Lipsett v. Blanco*, 975 F.2d 934 (1st Cir. 1992). It is questionable whether a district court may use a multi-

plier as punishment pursuant to §1988. *Cooper v. Pentecost*, 77 F.3d 829 (5th Cir. 1996).

The issue of whether fees may ever be doubled after the case of *City of Burlington v. Dague*, 505 U.S. 559 (1992), is an important question of federal law which has not been but should be clarified by the Supreme Court of the United States.

IV. The lower Court erred by calculating the fees of the ACLU/RFP at New York rates

The lower court approval of the fee awarded to the ACLU/RFP directly conflicts with the Sixth Circuit's decision in *Hadiz v. Johnson*, 65 F.3d 532 (6th Circuit 1995). The Sixth Circuit refused to approve the hourly rate of an out of town specialist in a case where the record was devoid of any suggestion that any attempt was made to retain counsel in the local market. Hourly rates should not exceed what is necessary to encourage competent lawyers within the relevant community to undertake legal representation. *Id.* at 536. The court found that there was no reason to believe that out of town counsel should receive more than local counsel. *Id.*

Reasonable fees under § 1988 are calculated according to the prevailing market rates in the relevant legal community. *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Stewart v. Gates*, 987 F.2d 1450, 1453 (9th Cir. 1993); *Hadiz v. Johnson*, 65 F.3d 523 (6th Cir. 1995); *Walker v.*

U.S. Dept. of Housing & Urban Development, 99 F. 3d 761 (5th Cir. 1996). Some circuits, including the Ninth Circuit, have made an exception where local counsel is not available. *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992). However, in the instant case, it is clear that a local firm, AC&B was available to represent the plaintiffs. There is no reason given why outside counsel should have received higher hourly rates than those awarded local counsel AC&B.

The district judge has a duty to review a fee award as to reasonableness and base its findings on evidence in the record even when a fee application is unopposed. *Stewart*, 987 F.2d at 1453; *Neft v. Vidmark, Inc.*, 923 F.2d 746 (9th Cir. 1991). The district judge failed to articulate any basis for his determination that a public interest group should be awarded fees based on large New York City firm rates. The award at New York rates is unreasonable and exorbitant. By permitting the award to stand, the lower court has ignored Supreme Court as well as Ninth Circuit precedent.

> It is to forestall such gorging at the ligation trough that the Supreme Court requires district courts to "provide a concise but clear explanation of [their] reasons for [a] fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.E. 2d 40. We have interpreted this as requiring "something more tha[n] a bald, unsupported amount." 977 F.2d at 1306. Else-

> where it's been said that the district court "has to make a judgment...in a reasoned (though brief) opinion-on what the case should have cost the party who submitted the request." *Heiar v. Crawford County, Wis*, 746 F.2d 1190, 1204 (7th Cir. 1984), cert. denied, 472 U.S. 1027, 105 S.Ct. 3500, 87 L. Ed. 2d 631 (1985).

Guam Society, 100 F.3d at 710 [Appendix E].

The ACLU/RFP submitted a fee request based upon rates charged by two of the largest law firms in New York. It did not submit any evidence of what the ACLU/RFP normally charges in cases such as this one. Both of these firms are ten times larger than ACLU/RFP. CR 299 and 269 (Wm. Josephson and J. Hall Decls.) The government opposed the rates requested by ACLU/RFP and gave support for their opposition in the form of an unreported decision from the U.S. District Court for the District of Utah where fees were awarded to the same ACLU/RFP attorneys as appeared in the Guam case. In the case challenging the Utah abortion act, the Judge reduced the hourly rate for Ms. Benshoof from a claim of $335 to $155; for Ms. Pine from a claim of $310 to an allowed rate of $125; and for Mr. Heller, from a claimed rate of $285 to $105. *Jane L., Utah Women's Clinic and David Hansen, et al. v. Bangarter*, Civ. No. 91-C-345G, Memorandum Decision and Order in re Attorneys Fees, p.17, fn. 16, App. A, Plaintiffs Award (C.C. Utah, June 29, 1993). This case was

brought to the District Court's attention on remand. That decision is the only evidence in the case of the rates actually awarded to ACLU/RFP attorneys. These rates are significantly lower than the fees awarded the same attorneys in this case.

The decision of the Ninth Circuit in this case is in direct conflict with the Supreme Court's decision in *Blum v. Stenson*, 465 U.S. 886 (1984) and the Sixth Circuit's decision in *Hadiz v. Johnson*, 65 F.3d 532 (6th Cir. 1995).

CONCLUSION

For the foregoing reasons, the Government of Guam requests the Supreme Court to grant the petition for Certiorari to review the decision of the Ninth Circuit Court of Appeals:

1. Approving a use of a multiplier to double fees for factors subsumed in the loadstar fee, contrary to the decision of this Court in *City of Burlington v. Dague*, 505 U.S. 112 S. Ct 2638 (1992);

2. Approving the use of a multiplier to double an already enhanced loadstar fee of local counsel, conflicting with the holdings of the Second and D.C. Circuits which require a showing of actual difficulties in finding counsel;

3. Approving the use of a multiplier to arrive at an award which is punitive in nature; and

4. Awarding fees to out of town counsel at large New York City rates which are higher than the prevailing market rates in the relevant legal community of Guam contrary to the decision of this Court in *Blum v. Stenson*, 465 U.S. 886, (1984) and in conflict with the Sixth Circuit in *Hadiz v. Johnson*, 65 F.3d 523 (6th Cir. 1995).

Dated this 15 day of August, 1997.

Respectfully submitted,

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